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No. 92-1856

In the Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF LADUE, ET AL., PETITIONERS

v.

MARGARET P. GILLEO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Does a municipal ordinance that bans all residential signs carrying political messages on private property within the municipality violate the First Amendment to the Constitution?

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INTEREST OF THE UNITED STATES

This case presents the question whether a municipal ordinance prohibiting the residential use of political signs violates the First Amendment. In light of its commitment to preserving natural beauty and promoting highway safety, as reflected in the Highway Beautification Act of 1965 (HBA), 23 U.S.C. 131, the United States has a substantial interest in the resolution of issues concerning the constitutional limits on sign regulation. The HBA encourages the States to enforce effective controls of signs along certain major highways, while permitting limited categories of exceptions for practical and constitutional reasons. Although the ordinance at issue

here differs in significant respects from the federal HBA, the analysis that the Court uses in the present case may have significant ramifications for this important federal program. The United States also has a substantial interest in the preservation of constitutional rights of free expression.

STATEMENT

1. Petitioner, the City of Ladue, Missouri (the City), is a small, largely residential suburb of St. Louis. The City has for many years regulated the use of outdoor signs by means of a municipal ordinance restricting such signs. The present case arose in December, 1990, when respondent, Margaret Gilleo, displayed a sign on the lawn of her home expressing her opposition to United States military involvement in the Persian Gulf.[1] Following the disappearance of her sign, respondent reported the matter to City officials, who informed her that the display of such a sign violated a city ordinance. Pet. App. 22a-23a. Respondent petitioned the Ladue City Council for a variance (permitted by the ordinance at that time), which the Council denied. *Id.* at 24a. Respondent thereupon filed this action, and sought a preliminary injunction against enforcement of the ordinance. *Id.* at 25a.

The district court granted the preliminary injunction, ruling that the ordinance deprived respondent of her constitutional right to free speech. Pet. App. 22a-31a. The court noted that the ordinance established a general prohibition on signs, while enumerating a variety of exceptions. *Id.* at 25a. Applying this Court's ruling in

[1] Respondent's initial sign was 24 by 36 inches in size, and stated: "Say No to War in the Persian Gulf, Call Congress Now." Pet. App. 22a.

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), the court ruled that Ladue's ordinance "[n]ecessarily included * * * a ban on all noncommercial speech and, specifically, on political or issue-related signs such as [respondent] seeks to erect in her yard." Pet. App. 28a. The court found that the exemptions provided by the ordinance created impermissible content-based distinctions that favored "certain forms of commercial speech" over "political speech." *Id.* at 29a.

Shortly thereafter, while the action was still pending before the district court, the Ladue City Council repealed the then-existing sign ordinance and enacted a new one, on which the subsequent proceedings were based. See Pet. App. 11a-12a. The new ordinance begins with an extensive "Declaration of Findings, Policies, Interests, and Purposes." (Such a statement had not been contained in the predecessor ordinance.) *Id.* at 35a-38a. Like the predecessor ordinance, the new enactment generally prohibits signs except as specifically authorized. See *id.* at 40a. The ordinance contains a number of exceptions, including exceptions for "[m]unicipal" signs, "[s]ubdivision and residence identification" signs, "[r]oad signs and driveway signs for danger, direction, or identification," "[h]ealth inspection" signs, signs "for churches, religious institutions, and schools," signs "identifying the location of public transportation stops," signs "advertising the sale or rental of real property," "[c]ommercial signs in commercially zoned or industrial[ly] zoned districts," signs "identifying safety hazards," and "gasoline filling station" signs. Ordinance §§ 35-4, 35-6 (Pet. App. 40a-41a, 42a). The ordinance omitted a variance provision, see Pet. Br. 22, but provided that "all existing signs that have previously been allowed by ordinance or approved by permit shall be permitted," Ordinance § 35-23 (Pet. App. 49a).

Respondent amended her complaint to include a challenge to the new ordinance, which City officials had interpreted as applying to a new 8-1/2 by 11 inch sign carrying the message "For Peace in the Gulf" that she had posted inside a second floor window of her home after adoption of the new ordinance. See Pet. App. 11a; *id.* at 3a.[2] The district court granted summary judgment for respondent, ruling that her challenge to the predecessor ordinance was moot, but entering a permanent injunction against the new ordinance. *Id.* at 11a-18a. The court again focused on the "explicit content-based exceptions" created by the ordinance, and referred to the analysis in its earlier ruling granting the preliminary injunction. See *id.* at 16a-17a.

2. The court of appeals affirmed. Pet. App. 1a-8a. Relying on the plurality opinion in *Metromedia*, *supra*, the court concluded that Ladue's ordinance raised "the same concerns" that led the *Metromedia* plurality to strike

[2] The new ordinance defines "Sign" very broadly so as to include "window signs" as small as respondent's:

> A name, word, letter, writing, identification, description, or illustration which is erected, placed upon, affixed to, painted or represented upon a building or structure, or any part thereof, or in any manner upon a parcel of land or lot, and which publicizes an object, product, place, activity, opinion, person, institution, organization or place of business, or which is used to advertise or promote the interests of any person. The word "sign" shall also include "banners", "pennants", "insignia", "bulletin boards", "ground signs", "billboards", "poster billboards", "illuminated signs", "projecting signs", "temporary signs", "marquees", "roof signs", "yard signs", "electric signs", "wall signs", and "window signs", wherever placed out of doors in view of the general public or wherever placed indoors as a window sign.

Ordinance § 35-1 (Pet. App. 39a).

down the San Diego ordinance at issue there as a content-based regulation. Pet. App. 3a-4a. The court observed that Ladue's ordinance "favors commercial speech over noncommercial speech,[3] and it favors certain types of noncommercial speech over others." *Id.* at 4a.

The court of appeals rejected the City's argument that the ordinance is valid under the "secondary effects" doctrine of *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Even assuming, *arguendo*, that the "secondary effects" doctrine "extends to cases involving the prohibition of political signs on private property," the court held that the argument failed because "Ladue has not shown that the prohibited signs cause more aesthetic, safety, and property value problems than the permitted signs." Pet. App. 5a.

Having determined that Ladue's ordinance drew distinctions based on the content of the messages displayed, the court of appeals applied "strict scrutiny," under which "content-based restrictions must be necessary to serve a compelling interest and must be narrowly drawn to achieve that end." Pet. App. 6a-7a. The court held that, while Ladue's interests were "substantial," they were "not sufficiently 'compelling' to support a content-based restriction." *Id.* at 7a. Nor was Ladue's ordinance "the least restrictive alternative." *Ibid.*

3. The Highway Beautification Act of 1965 (HBA), Pub. L. No. 89-285, § 101, 79 Stat. 1028, encourages States to control the use of signs along certain major highways, in order to preserve the scenic beauty of those

[3] In a footnote at this point, the court observed: "For example, the ordinance permits commercial signs in districts zoned for commercial or industrial use, but it prohibits most noncommercial signs in those districts." Pet. App. 4a n.4

roads and promote highway safety. 23 U.S.C. 131. Although this federal statute and the state laws enacted pursuant to it are not directly at issue in this case, they raise somewhat similar issues, and have been the subject of First Amendment challenges. See, *e.g.*, *Wheeler* v. *Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), cert. denied, 484 U.S. 1007 (1988); *Rappa* v. *New Castle County*, 813 F. Supp. 1074 (D. Del. 1992), appeal pending, No. 92-7293 (3d Cir.).

The explicit purpose of the HBA is to "to protect the public investment in * * * highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a). The HBA's key provision is a requirement that all States provide—on penalty of a ten percent reduction of federal highway funds—for the "effective control of the erection and maintenance * * * of outdoor advertising signs, displays, and devices" in designated areas. 23 U.S.C. 131(b). A State must regulate such signs within specified distances[4] of Interstate or "primary system"[5] highways. *Ibid.* As a general matter, the HBA addresses only signs that are both visible from, and within 660 feet of, such

[4] As originally enacted, the HBA applied to signs within 660 feet of such highways. In 1975, the HBA was amended, see Federal-Aid Highway Amendments of 1974, Pub. L. No. 93-643, § 109(a), 88 Stat. 2284, to include signs "located outside urban areas" that were beyond the 660-foot limit, but only when such signs are both visible to motorists on the highways and "erected with the purpose of their message being read from [the] main traveled way." 23 U.S.C. 131(b); 23 C.F.R. 750.704(a).

[5] The "primary system" (which now exists only for purposes of the HBA) consists of a number of major state highways, which are financed in part by federal highway funds. See 23 U.S.C. 131(t) (Supp. IV 1992).

highways. *Ibid.*; 23 C.F.R. 750.703(i) and (n).[6] Thus, the HBA does not require the States to regulate very small signs or other signs that are not visible from the roadways regulated under the HBA. Respondent's sign, for example, would not be covered by the HBA.[7]

The HBA permits the States to decide whether to impose any regulations at all, and if so to what extent, in areas "zoned industrial or commercial under authority of State law." 23 U.S.C. 131(d).[8] In other areas, the HBA requires States to limit signs to (1) "directional and official" signs; (2) signs "advertising the sale or lease of property upon which they are located"; (3) signs "advertising activities conducted on the property on which they are located"; (4) landmark signs, "including signs on farm structures or natural surfaces, or [signs of] historic or artistic significance the preservation of which would be consistent with the purposes of [Section 131]"; and (5) signs "advertising the distribution by non-

[6] As indicated in note 4, *supra*, States are required to regulate signs further than 660 feet from highways only when they are erected with the purpose of being visible from the highway.

[7] See 23 C.F.R. 750.703(n) (defining the term "visible" to mean "capable of being seen, whether or not readable, without visual aid by a person of normal acuity").

[8] Section 131(d) provides that the Secretary, and each State, enter into an agreement establishing size, lighting and spacing standards for industrial and commercial zones. These agreements also establish definitions as to what constitutes a zoned industrial and commercial area in each State. The HBA does not impose any restrictions as to the content or nature of any sign meeting the agreements' standards. See 23 U.S.C. 131(d).

profit organizations of free coffee." 23 U.S.C. 131(c).[9] The HBA also permits States to allow "information centers," 23 U.S.C. 131(i), and government sponsored signs on public rights-of-way "giving specific information in the interest of the traveling public," 23 U.S.C. 131(f).

SUMMARY OF ARGUMENT

The federal Highway Beautification Act of 1965 (HBA) regulates the use of signs along major roads in the United States for aesthetic and safety purposes. The HBA is carefully tailored to limit its regulatory reach to accomplish this purpose. It does not impose a total prohibition on the residential display, within an entire community, of ideological and issue-related signs. The HBA also contains a broad and nondiscriminatory "on-site" exception that is both constitutionally permissible and an important safeguard against overly restrictive free expression legislation.

By contrast, the City of Ladue has enacted a municipal ordinance that completely prohibits residents from displaying signs on any political or social topics in, on, or about their homes. The residential display of such signs, however, is a method of communication and personal self-expression that has unique advantages for private

[9] Several of the HBA's exceptions are related to the strong governmental interests in accommodating signs that facilitate and insure the safety of travel along the nation's roadways. Sign regulations that permit direction and location signs, traffic control signs ("stop signs," traffic lights, etc.), and other signs enhancing travel safety (*e.g.*, those identifying roadstops and the availability of coffee), but that do not allow some other signs, do not raise significant constitutional problems. Such signs are essential to the orderly flow of traffic and, by properly directing travelers to their destinations, facilitate the efficient use of increasingly overburdened roadways.

individuals of modest or limited means. A total prohibition of such a form of communication within an entire political community must therefore pass a stringent constitutional test that, at the very least, requires a conclusion that the City's purposes could not have been served substantially as well by less prohibitory regulations.

Ladue's expressed aim is to curb the "proliferation of an unlimited number of signs" that is a threat to aesthetics, safety and privacy. Pet. App. 36a. Although these are legitimate and substantial governmental purposes, such a total prohibition on all residential issue-related signs is, in this case, a plainly overbroad mechanism for vindicating that concern. Ladue's ordinance already contains careful limitations on the number, size and placement of signs that the ordinance permits. Ladue has presented no evidence to indicate, nor does it seem likely, that an unlimited proliferation would occur if similar non-prohibitory regulations were imposed upon residential signs like the one involved in this case.

ARGUMENT

I. THE CITY OF LADUE HAS A SUBSTANTIAL INTEREST IN REGULATING SIGNS FOR AESTHETIC AND SAFETY REASONS

At the outset of this case, it is important to recognize that the City of Ladue's interest in regulation of visual blight—for aesthetic and safety reasons—constitutes a substantial governmental objective. A city's aesthetic "interests are both psychological and economic. The character of the environment affects the quality of life and the value of property in both residential and commercial areas." *Members of City Council* v. *Taxpayers*

for Vincent, 466 U.S. 789, 817 (1984); see *id.* at 807 ("We reaffirm the conclusion of the majority in [*Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981)] * * * [that] the visual assault * * * presented by an accumulation of signs posted on public property * * * constitutes a significant substantive evil within the City's power to prohibit."). Additionally, since outdoor signs along public highways are intended to attract the attention of motorists, such signs may pose a risk to traffic safety. See *Metromedia*, 453 U.S. at 509 (declining "to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety").

These twin concerns of highway safety and the preservation of natural beauty have motivated federal efforts to regulate outdoor signs, and are similarly implicated by local ordinances such as the one at issue in this case. See 23 U.S.C. 131(a); cf. Pet. App. 35a-38a. Moreover, particular communities, natural reserves and historical sites, because of their "unique and special heritage," may have a special interest in regulating for aesthetic purposes.[10] Cf. *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 129 (1978). The City of Ladue in fact alleges such enhanced interests in support of its sign ordinance. Pet. 4; Pet. Br. 46-47; see also *id.* at 3-5 (describing the City's "Unique Aesthetic Ambience").

[10] In *Metromedia*, Justice Brennan stated that he had "little doubt that some jurisdictions will easily carry the burden of proving the substantiality of their interest in aesthetics." 453 U.S. at 533-534 (concurring in the judgment). Areas lacking historical qualities, however, "should not be prevented from taking steps to correct, as best they may, mistakes of their predecessors." *Id.* at 570 (Rehnquist, J., dissenting).

Somewhat similarly, Congress encourages States to protect the ambience of areas of pristine beauty along primary highways that qualify as "scenic byways." See 23 U.S.C. 131(s) (Supp. IV 1992); Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1046(c), 105 Stat. 1996; see also *id.* § 1047, 105 Stat. 1996-1999 (codified at 23 U.S.C. 101 note (Supp. IV 1992)).[11]

II. THE DISPLAY BY RESIDENTS ON THEIR OWN PROPERTY OF SMALL SIGNS ON TOPICS OF PUBLIC INTEREST IS AN IMPORTANT FORM OF FIRST AMENDMENT EXPRESSION

The First Amendment's protection of expression applies to a wide variety of methods of communication, ranging in extent from private personal conversations to international broadcasts via the mass media. In applying the Amendment to these different media, each must be considered in light of its special communicative characteristics. *Metromedia*, 453 U.S. at 501 ("law must reflect the 'differing natures, values, abuses and dangers' of each method") (quoting *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)); see also *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression * * * must be assessed

[11] The City, drawing on *Frisby* v. *Schultz*, 487 U.S. 474 (1988), also seeks to justify its ordinance based on the privacy rights of its citizens. See Pet. Br. 43-44. *Frisby*, however, only recognized a significant governmental interest in protecting the sanctity of the home from speech (picketing) targeting "unwilling listeners * * * when within their own homes." 487 U.S. at 485. Because the placement by a homeowner of a small sign in a window or on a lawn does not similarly invade the sanctity of a neighbor's home, *Frisby* would not seem to apply to such activity. Cf. *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

for First Amendment purposes by standards suited to it, for each may present its own problems."); *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952).

The placement by residents of small signs on their own property, visible to neighbors and passersby, as a means of expressing personal positions on public issues must, we think, be recognized as being among the means of political self-expression subject to First Amendment analysis. See, *e.g.*, *Metromedia*, 453 U.S. at 501 (quoting *Metromedia, Inc.* v. *City of San Diego*, 610 P.2d 407, 430-431 (Cal. 1980) (Clark, J., dissenting), rev'd, 453 U.S. 490 (1981)) ("The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or 'broadside' to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes."); see also *Taxpayers for Vincent*, 466 U.S. at 811 (recognizing that such homeowner signs constitute "a significant opportunity to communicate" that need not be regulated in the same way as signs on public property).[12]

Small individual residential signs expressing personal viewpoints and other messages in urban areas are substantially different in character from the billboards that were the subject of this Court's decision in *Metromedia*, and that are also the primary focus of the state regulations encouraged by the HBA.[13] Such billboards are

[12] The fact that the regulation in *Taxpayers for Vincent* did not apply to "homeowner signs" distinguishes that limited ban from the instant case.

[13] All signs meeting the definitional criteria explained *infra* are potentially subject to the Act. Billboards, however, are the primary target of the HBA and account for its enactment.

primarily utilized by relatively well-funded enterprises. Business concerns, candidates, political parties and other groups with sufficient funds to rent billboard space, or to erect their own displays, use billboards to communicate their advertising messages to great numbers of potential customers and voters. For these advertisers, billboard use is ordinarily one of a number of means of available communication; other available means may frequently include television and radio advertisements, the purchase of newspaper and magazine advertising space, unsolicited mailings, telephone "trees" and campaigns.

Signs like the one at issue in this case, on the other hand, are often the only way in which an individual—unless he or she is wealthy—can make a public statement. This Court has, on several occasions, recognized the importance of that fact in the analysis of First Amendment cases. See, *e.g.*, *Taxpayers for Vincent*, 466 U.S. at 812 n.30 (acknowledging "special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry"); *Martin* v. *City of Struthers*, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); *Schneider* v. *State*, 308 U.S. 147, 164 (1939) ("pamphlets have proved most effective instruments in the dissemination of opinion"). The display of residential signs as a means of expression resembles in function the display by individuals on their person of campaign buttons, issue-related armbands and ribbons, and insignia of various causes or organizations. Both kinds of statements are an important way—and often the best way—for individuals to make public (1) their personal affiliation with, or commitment to, political parties and candidates; (2) their positions on national or local issues; and

(3) the moral precepts, movements and charitable causes they support. No other means through which ordinary citizens may express such ideas to their neighbors is as readily available, personal, inexpensive and unintrusive upon others.[14]

An obvious advantage of placing political and similar signs on one's own property is that individuals can affirmatively link themselves to the signs' messages. Cf. *Linmark Assocs., Inc.* v. *Township of Willingboro*, 431 U.S. 85, 95-96 (1977).[15] Such a link significantly enhances the impact of the message, and it does so in a way that often cannot reasonably be replaced by the use of other media. Moreover, as to some local issues, neighbors provide the most appropriate (and possibly the only relevant) audience for the message.

[14] Other potential methods of communicating personal positions on issues to one's neighbors often come with serious shortcomings. Advertisements in local newspapers (if such exist) are likely to be at least moderately expensive. Unsolicited mailings are somewhat intrusive, quite time-consuming for a private individual, and even more expensive. Unsolicited telephone calls can be especially intrusive. Leafletting is time-consuming for a private individual, contributes to litter, and may also be costly. Fixed or moving street or sidewalk displays and residential loudspeakers have similar drawbacks. See generally *Arlington County Republican Comm.* v. *Arlington County*, 983 F.2d 587, 594-595 (4th Cir. 1993). Moreover, as *Schneider* and *Martin* illustrate, the availability of one medium of expression does not justify a ban of another.

[15] The messages on certain signs, when placed in particular locations, have unique value for which alternative channels do not exist even if such signs are permitted in other areas of a community. Thus, in *Linmark* this Court invalidated an ordinance prohibiting "For Sale" signs on residential property, in part because of the unique link between the "For Sale" message and the property sold.

We think that there is no dispute, therefore, that residents and homeowners who display small neighborhood signs on their own property are entitled to seek the protection of the First Amendment.[16] We now turn to an analysis of how such protection should be balanced against a community's acknowledged substantial interests in traffic safety and aesthetics.

III. LADUE'S ORDINANCE IS UNCONSTITUTIONALLY OVERBROAD

A. Ladue's Ordinance Imposes A Total Ban On A Form Of Protected Expression

There is no dispute in this case that Ladue's ordinance imposes a total ban on the residential display of signs containing political, social or religious statements or messages. Indeed, Ladue's ordinance bans all residential messages whatsoever, except for "residence identification signs" and "signs advertising the sale or rental of real property." Ordinance §§ 35-2, 35-4(b) and (h) (Pet. App. 40a-41a). What constitutes a prohibited "sign" is also defined with spectacular breadth in Ladue's ordinance. For example, although it is difficult to imagine how respondent's small, 8-1/2 by 11 inch, political-issue placard could, when placed in a window on the second floor of her home, see J.A. 194-195, possibly affect the City's interests in "privacy, aesthetics, and safety," Pet. App. 35a, "sign" is nevertheless defined in the ordinance as specifically including "window signs," which are in turn defined as "[a]ny sign erected, attached to the outside or inside of a window, or placed immediately inside of

[16] Small signs may in certain circumstances be constitutionally protected in the same locations at which large billboards might be constitutionally prohibited.

a window for public display purposes to persons on the outside of such building or structure." Ordinance § 35-1 (Pet. App. 39a, 40a).

Under the ordinance, it is therefore illegal for a resident to place, anywhere on his or her property, a sign with any message or statement other than a sign advertising the property as being for sale or lease. It does not matter how large or small the sign is, whether it is visible to pedestrian or automobile traffic, whether it obscures the ability to see oncoming traffic or pedestrians, whether it is visible from other residences, parks or public places, whether it is a solitary residential sign or one of a great number of such signs on a single piece of property, or whether it relates to an event on the property where it is placed or to a local issue or election of immediate importance to the neighborhood. The display of such signs by residents in the City is absolutely forbidden in all circumstances.

B. A Total Ban On A Protected Form Of Expression Is Constitutional Only If More Limited Regulations Would Not Achieve The City's Purpose

This Court's decisions have properly and repeatedly made clear that if a state or political subdivision completely bans a constitutionally protected means of expression, such a total ban will be upheld, if ever, only in the most exigent circumstances. Thus, in *Schneider* v. *State*, 308 U.S. 147 (1939), perhaps the first of these cases, the Court invalidated a total ban on the distribution of leaflets within a municipality. After finding that leafletting is a medium of political expression with deep historical traditions, the Court weighed that free expression interest against what it recognized as the city's legitimate interest in keeping its streets "clean and of good appearance." *Id.* at 162. The Court held the total

ban unconstitutional, noting that "[a]ny burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press." *Ibid.*

More recently, the Court, in upholding a residential picketing prohibition only as it applied to picketing that is focused on a particular residence, noted that such focused picketing "is fundamentally different from more *generally directed means of communication that may not be completely banned in residential areas.*" *Frisby* v. *Schultz*, 487 U.S. 474, 486 (1988) (emphasis added) (citing *Schneider* v. *State*, *supra*, *Martin* v. *City of Struthers*, *supra*, and *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943)). *Frisby* noted further that "[a] complete ban can be narrowly tailored, *but only if each activity within the proscription's scope is an appropriately targeted evil.*" 487 U.S. at 485 (emphasis added).[17]

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[17] See also *Lee* v. *International Soc'y for Krishna Consciousness, Inc.*, 112 S. Ct. 2709, 2710 (1992) (per curiam) (invalidating ban on leafletting in an airport terminal); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981) (invalidating an ordinance because it "*totally exclude*[*d*] all live entertainment" from a municipality); *Martin*, 319 U.S. at 146-147 (emphasis added) (invalidating a municipal ordinance forbidding door-to-door solicitation, and stating that the "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be *fully preserved*"); cf. *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) (emphasis added) (explaining that "in the case of an ordinance that *completely prohibits* a particular manner of expression," the question is whether "the manner of expression is *basically incompatible with the normal activity of a particular place at a particular time*").

Applying these principles to ordinances that completely ban all or almost all noncommercial residential signs from a community, lower state and federal courts have uniformly found such bans to be unconstitutional.[18] See, *e.g.*, *Loftus* v. *Township of Lawrence Park*, 764 F. Supp. 354, 360-361 (W.D. Pa. 1991) (ban on all residential signs except "for sale" or "garage sale" signs not content-neutral); *Fisher* v. *City of Charleston*, 425 S.E.2d 194, 198-199 (W. Va. 1992) (invalidating ban on residential political signs); *Goward* v. *City of Minneapolis*, 456 N.W.2d 460, 464-468 (Minn. Ct. App. 1990) (invalidating ban on residential "political," but not campaign, signs as a content-based restriction; in dicta, finding the provision did not leave open ample alternative channels of communication and was not "narrowly tailored"); *City of Lakewood* v. *Colfax Unlimited Ass'n*, 634 P.2d 52, 61-62 (Colo. 1981) (en banc) (invalidating an ordinance that permitted campaign, but not other ideological, signs); *State* v. *Miller*, 392 A.2d 1222, 1225 (N.J. Super. Ct. App. Div. 1978) (State conceded that "a municipality is, by reason of the First Amendment, precluded from total prohibition of an individual's freedom of political expression through the technique of posting a sign on his own property"), aff'd, 416 A.2d 821 (N.J. 1980); *Farrell* v. *Township of Teaneck*, 315 A.2d 424 (N.J. Super. Ct. Law Div. 1974) (invalidating, as an unduly restrictive regulation, a flat ban on political signs in residential zones); *Peltz* v. *City of South Euclid*, 228 N.E.2d 320 (Ohio 1967) (invalidating total ban on political signs); cf. *Arlington County Republican Comm.* v. *Arlington County*, 983 F.2d 587, 594 (4th Cir. 1993) (invalidating regulation permitting two temporary political signs per

[18] Our review of published federal and state court decisions has revealed no case upholding such a ban.

residence; "the two-sign limit infringes on [free] speech by preventing homeowners from expressing support for more than two candidates when there are numerous contested elections").

The rule that emerges from these cases is that, if a complete ban within a community on a protected medium of expression is ever to be upheld, that will occur only when it is apparent not only that the community's substantial interests are furthered by such a total prohibition, but that there is a demonstrable basis for concluding that a complete ban (rather than more modest restrictions) is necessary to serve those governmental interests.[19] Such a finding of necessity can be made, we think, only when there is some basis in either logic or experience for concluding with reasonable confidence that restrictions short of a total prohibition will be significantly less effective in achieving the articulated governmental goals.[20] We therefore turn to the purposes

[19] The HBA, which does not impose a total ban even on the relatively large signs upon which it focuses, should not bear as heavy a burden.

[20] The standard we suggest is similar to that utilized by Justice Brennan in his concurring opinion in *Metromedia*. Justice Brennan there announced his intention to "apply the tests this Court has developed to analyze content-neutral prohibitions of particular media of communication," namely, whether "a sufficiently substantial governmental interest is directly furthered by the total ban, and [whether] any more narrowly drawn restriction, *i.e.*, anything less than a total ban, would promote less well the achievement of that goal." 453 U.S. at 526-528.

We thus believe that it is appropriate to apply a stricter standard of constitutional review to legislation that completely prohibits a medium of communication within a community than the standard of constitutional review that is applied to legislation that merely regulates the time, place or manner of speech in public places in the community, while permitting the medium of commu-

of Ladue's ordinance to examine whether that test is met in this case.

C. The City's Expressed Purpose Of Preventing The Proliferation Of An Unlimited Number Of Signs Can Almost Certainly Be Accomplished Through Regulations On The Number, Size And Placement Of Signs; In These Circumstances A Total Ban On Residential Signs Is Unconstitutional

After the district court's initial imposition of a preliminary injunction in this case, the City of Ladue enacted the current ordinance which included, for the first time, an explicit "Declaration of Findings, Policies, Interests, and Purposes." See Ordinance Art. I (Pet. App. 35a-38a). In doing so, the City identified as its primary objectives the fostering of the "rights and values of privacy, aesthetics, and safety" within the community. Pet. App. 35a-36a. The City then declared that the evil threatening those important community values was "the proliferation of *an unlimited number of signs* in private, residential, commercial, industrial, and public areas of the City of Ladue." *Id.* at 36a (emphasis added). Such unlimited proliferation, it was declared, "would create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture[,] impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children." *Ibid.*

One can easily agree with Ladue's governing body that the proliferation of "an unlimited number" of signs within the community might well produce some or all of

nication to be utilized in accordance with those limited regulations. See, *e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).

these unfortunate consequences.[21] It seems equally apparent, however, that permitting only a *limited* number of residential signs in the community, especially if that permission were coupled with appropriate regulations on the size, placement and appearance of those signs, would almost certainly *not* result in those considerable evils. If, for example, residential signs were required to be placed out of traffic or pedestrian sight lines, it is difficult to see how such signs could "cause safety and traffic hazards to motorists, pedestrians, and children." Similarly, if each residential unit in Ladue were permitted to display a limited number of small window signs of the type sought to be displayed by respondent in this case then, even in the completely unlikely event that *every* residence took full advantage of this opportunity, it is difficult to believe that such displays would "create ugliness, visual blight and clutter," "tarnish the natural beauty of the landscape as well as the residential * * * architecture," "impair property values," or "substantially impinge upon the privacy and special ambience of the community."

The point is simply that Ladue, in pursuit of thoroughly laudable objectives, has struck an inappropriate balance between those objectives and the constitutionally protected rights of individuals to free expression.[22] If an *unlimited* proliferation of signs is the

[21] On-site/off-site distinctions, discussed at note 27, *infra*, directly further this key interest in controlling the *proliferation* of outdoor signs. The HBA's restrictions on off-site signs limit sign proliferation by precluding the erection of billboards away from premises at which activities are conducted, and by limiting signs at premises to those signs pertaining to the activities conducted there. See 23 U.S.C. 131(c)(3).

[22] The record is devoid of evidence suggesting that the City has undertaken to determine whether a less restrictive ordinance

apprehended danger (as Ladue's ordinance states), the constitutionally appropriate governmental response is to place reasonable numerical, and perhaps other, limits on signs—not to ban them altogether so as to unnecessarily intrude on the right of residents to use a traditional, valuable and constitutionally protected mode of expression.

Such reasonable limits could certainly include a restriction on the number of signs that can be displayed at each residential unit. Indeed, Ladue has already imposed precise numerical limits of this kind. Ladue's churches, religious institutions and schools, for example, are specifically limited by the ordinance to one sign in addition to an "identification" sign, Ordinance § 35-5 (Pet. App. 41a); gasoline filling stations are specifically limited to a total of six or seven signs (depending on whether the station is located on a corner lot), Ordinance § 35-6 (Pet. App. 42a); and commercial and industrial establishments are entitled to at least three signs (six if they border on two streets), Ordinance § 35-7 (Pet. App. 43a-44a). Appropriate limits for the City's consideration might also include size limitations, which Ladue has already imposed throughout its ordinance, see, *e.g.*, Ordinance § 35-10 (Pet. App. 45a) (real estate "for sale" or

would sufficiently further its objectives. It appears that the only evidence arguably reaching this point is the "Supplemental Affidavit of Edith J. Spink," which includes a reference to a videotape of political campaign signs filmed in other jurisdictions during a Missouri election campaign. J.A. 197-198. Ms. Spink stated that on the same day she "observed a general proliferation of yard signs * * * both on private property and in public areas and street rights-of-way." *Id.* at 197. There is no indication, however, that the jurisdictions Ms. Spink observed imposed, or even would want to impose, reasonable time, place and manner restrictions on such signs.

"for lease" signs limited to six square feet in area), or limitations upon where signs may be located on private property, which Ladue has also already utilized, see, *e.g.*, Ordinance § 35-6 (Pet. App. 42a) (gasoline filling station "banjo" signs may be placed "no closer to a street than the nearest edge of the road right-of-way").

Ladue's proper constitutional course is thus to utilize appropriate time, place and manner regulations,[23] rather than the total ban it has chosen to impose. Such an approach would fully vindicate Ladue's substantial concern with unlimited proliferation, while simultaneously preserving the essential constitutional rights of its residents.

IV. THE FEDERAL HIGHWAY BEAUTIFICATION ACT IS A VALID TIME, PLACE AND MANNER REGULATION, RATHER THAN A TOTAL BAN ON PROTECTED RESIDENTIAL SIGNS; AS SUCH IT IS PLAINLY CONSTITUTIONAL

In contrast to Ladue's ordinance, the federal Highway Beautification Act (HBA) does not constitute a total ban on residential signs within any community. It is, instead, a sensitively crafted time, place and manner regulation that properly balances federal aesthetic and safety concerns with the constitutional rights of individuals. While it would be inappropriate in this case for the Court to express a view on the meaning or validity of HBA provisions that are not at issue,[24] the HBA's limited ap-

[23] Indeed, the ordinance's preamble makes explicit reference both to the need for regulation of "the time, place, and manner" of the display of signs and to the necessity that signs "should be carefully *regulated*." Pet. App. 36a (emphasis added).

[24] In *Metromedia*, the Court expressly declined to express any view on the constitutionality of the HBA. See 453 U.S. at 515 n.20

proach may, we think, nevertheless be useful for purposes of comparison with Ladue's sweeping prohibitions.

One important difference between the HBA and Ladue's ordinance is that the HBA's strictures do not reach entire communities, but only apply to signs visible from, or within a 660-foot wide strip on each side of, certain major highways. 23 U.S.C. 131(b); see note 6, *supra*.[25] The HBA, therefore, does not create the threat of interfering with a method for the communication and exchange of ideas within an entire local community. Moreover, even within the limited strips of land covered by the HBA, that Act does not reach *all* signs, but only those that are placed so as to be visible from "the main traveled way." 23 U.S.C. 131(b). If, for example, a residence were adjacent to a primary highway, with a local street located at the front of the home, the HBA would not require a State to regulate a sign that may be placed at the front of the residence, and thus be visible from the local street but not from the highway. Moreover, even residential signs facing the primary highway are not restricted unless they are sufficiently large so that their message is visible from a vehicle on the highway (even though such a small sign could easily serve the purpose of communication with neighbors and passersby).

(opinion of White, J.); *id.* at 534 n.11 (Brennan, J., concurring in the judgment).

[25] The HBA applies only in areas adjacent to the Interstate and Federal-Aid primary systems. See note 4, *supra*, and accompanying text. These two systems together account for 7.8% of all roads and streets in the United States but carry 50.6% of all the vehicle miles traveled. U.S. Dep't of Transportation, Federal Highway Administration, *Highway Statistics 1991*, at 130, 196 (1992).

In thus limiting the scope of its regulations and prohibitions, the HBA comports with the constitutional requirement that content-neutral time, place and manner regulations be "justified without reference to the content of the regulated speech," be "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (*CCNV*)). See *Kovacs* v. *Cooper*, 336 U.S. 77 (1949). Ladue, as we have said, could have similarly tailored its regulations so as to fit the identified problem of unlimited proliferation by limiting the number, size, appearance and placement of residential signs.

The opinion of the court of appeals in this case identified the fact that Ladue's ordinance "favors commercial speech over noncommercial speech" as a principal constitutional vice of that ordinance. Pet. App. 4a. The court of appeals noted, in this connection, that Ladue's ordinance "permits commercial signs in districts zoned for commercial or industrial use, but it prohibits most noncommercial signs in those districts." *Id.* at 4a n.4.[26] No similar distinction favoring commercial speech is incorporated in the HBA.

Finally, the HBA contains a useful and nondiscriminatory general "on-site" exemption absent from Ladue's ordinance. Under this "on-site" provision, an occupant may display signs "advertising activities conducted on the property on which they are located." 23 U.S.C.

[26] The court here apparently referred to the provision of Ladue's ordinance that permits only "[c]*ommercial* signs in commercially zoned or industrial[ly] zoned districts." Ordinance § 35-4(i) (Pet. App. 41a) (emphasis added).

131(c)(3). This provision is applicable to noncommercial signs, as well as to commercial and industrial advertisements—"advertise", that is, is used in its noncommercial sense of "to make generally known." *Webster's Third New International Dictionary* 31 (1976). Thus, even within the HBA's conceded area of coverage, a resident such as respondent could legally display a sign announcing and inviting attendance at an anti-war meeting scheduled to take place at her residence. To take another example, a prayer vigil that is to take place at a residence within the HBA's coverage could be advertised by a sign placed at that residence, even if it were located within a completely residential area.

The presence of such a broad "on-site" exception in the HBA, applicable to noncommercial as well as commercial and industrial users, moderates any potential impact that Act might otherwise possibly have on constitutionally protected expression within its limited coverage.[27]

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[27] Some courts (none addressing the HBA) have appeared to take the view that exceptions for on-site signs are necessarily content-based. See, *e.g.*, *National Advertising Co.* v. *Town of Niagara*, 942 F.2d 145, 147 (2d Cir. 1991). Other courts have upheld on-site/off-site distinctions as content-neutral restrictions based on the *location* of speech. See, *e.g.*, *Wheeler* v. *Commissioner of Highways*, 822 F.2d 586, 589-594 (6th Cir. 1987) (addressing the HBA), cert. denied, 484 U.S. 1007 (1988).

One source of confusion regarding the effect of on-site provisions that has led some courts to proceed on the premise that they are inherently content-based is the assumption that on-site provisions necessarily favor commercial over noncommercial speech. See, *e.g.*, Pet. App. 4a. Although the *Metromedia* plurality found that the ordinance in question there made *no* provision for on-site, noncommercial messages, see 453 U.S. at 513 (opinion of White, J.), not all enactments distinguishing between on-site and off-site signs share this defect. The HBA, for example, permits signs "advertising activities conducted on the property on which they

The terms of Ladue's ordinance, in contrast, limit the ap-

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are located," 23 U.S.C. 131(c)(3), permission which doubtless encompasses messages pertinent to the activities of campaign offices, churches and other noncommercial groups. See *Wheeler*, 822 F.2d at 590-591. A neutral exception for on-site signs such as that incorporated in the HBA is not merely neutral with respect to the viewpoint espoused, but is entirely neutral with respect to the *topics* that can be addressed in permitted signs. See *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 537 (1980); *Messer* v. *City of Douglasville*, 975 F.2d 1505, 1509 (11th Cir. 1992), cert. denied, 113 S. Ct. 2395 (1993).

This Court's ruling in *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), supports the conclusion that a regulation that depends upon the relationship of a message to a particular location may be considered to be content-neutral. There the Court upheld a state fair rule restricting certain types of speech to fixed locations (*i.e.*, fair booths) that had to be rented. The regulated speech was thus limited to that of the group that had rented that location. Such a system may be considered as satisfying the criterion of content-neutrality because it discriminates against no viewpoint or subject matter and instead merely regulates the *location* of various activities. See *id.* at 648-649.

The mere fact that one must know the content of a particular sign in order to determine whether it qualifies as an on-site sign at a particular location does not, we think, mean that an on-site/off-site distinction should be deemed to be content-based. This Court's decisions have never insisted that a regulatory scheme be entirely blind to the content of expressive activities; rather, the key inquiry is whether a given restriction is "*justified* without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (emphasis added) (quoting *CCNV*, 468 U.S. at 293); see *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). In *City of Renton*, for example, the Court upheld a scheme restricting the locations at which sexually explicit movies could be shown, even though city officials applying such an ordinance would be required to inquire into the content of particular movies in enforcing the law. 475 U.S. at 48.

plicability of any "on-site" exception to expression in "commercially zoned or industrial[ly] zoned districts" and, even within those commercial districts, permit only on-site "commercial" signs (although residential and other noncommercial uses are presumably also permitted within such zones). Ordinance § 35-4(i) (Pet. App. 41a).[28]

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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[28] Thus, if a municipal courthouse were to be erected in Ladue, it could apparently not bear a phrase such as "Equal Justice Under Law" as an engraving on its facade. (A sign advertising a courthouse-complex souvenir shop or cafeteria would, however, be permitted). A resident also could plainly not display such a phrase, or any other like it (*e.g.*, "Welcome home Gulf troops"), at his or her home.